WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

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Developments in Constitutional Law: Abortion

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Current U.S. Supreme Court case law interprets the U.S. Constitution to guarantee a right to abortion until a fetus is "viable" – i.e., able to survive outside a uterus. However, in recent cases, some justices have signaled a readiness to overrule, or at least significantly modify, past precedent. This issue brief summarizes key precedents, the doctrine of *stare decisis*, and a pending Supreme Court case, *Dobbs v. Jackson Women's Health Organization*, relating to the constitutionality of laws limiting abortion.

KEY LEGAL PRECEDENTS

Roe v. Wade and *Planned Parenthood v. Casey*

The U.S. Supreme Court first recognized a constitutional right to pre-viability abortions in its 1973 *Roe v. Wade* decision. *Roe* involved a constitutional challenge to a state law that criminalized abortion except when necessary to save a mother's life. Noting the "sensitive and emotional nature of the abortion controversy," the Court sought "to resolve the issue by constitutional measurement, free of emotion." The Court held that a right of privacy, grounded primarily in the Fourteenth Amendment's due process clause, guarantees the right to an abortion before viability. But it held that the right to privacy is not "absolute"; after viability, states have far greater latitude to regulate abortion. The decision relied on prior decisions that had recognized a "fundamental" right to personal privacy in the contexts of marriage, procreation, family relationships, and child rearing and education. [410 U.S. 173 (1973).]

The Court reaffirmed *Roe*'s central holding two decades later, in *Planned Parenthood v. Casey*. In *Casey*, the Court also articulated a new "undue burden" standard for evaluating the constitutionality of abortion regulations. Under that standard, a law must not impose a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." [505 U.S. 833 (1992).]

Subsequent Cases

In cases since the seminal *Roe* and *Casey* decisions, the Court has continued to recognize a right to pre-viability abortions, but with an increasing number of justices expressing skepticism regarding the constitutional grounding for that right and some disagreement regarding how the "undue burden" standard should be applied. A 2016 case, *Whole Women's Health v. Hellerstedt*, involved a state law that required abortion providers to have admitting privileges at nearby hospitals. Interpreting *Casey*'s undue burden test to require courts to balance the "burdens a law imposes on abortion" and "the benefits those laws confer," the Court struck down the admitting privileges requirement. [579 U.S. 582 (2016).]

When the Court considered a very similar admitting privileges requirement four years later, in *June Medical Services v. Russo*, 591 US ___ (2020), only four justices joined a plurality opinion applying the *Hellerstedt* balancing analysis. Chief Justice Roberts, who provided the crucial fifth vote to overturn, did so based on the doctrine of *stare decisis*, discussed below. In an opinion concurring in the judgment, he wrote that the doctrine compelled the Court to reach the same outcome as in *Hellerstedt* even though it was "wrongly decided." He characterized the *Hellerstedt* "balancing" approach as a misreading of *Casey*, saying: "Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." Four other justices dissented, with varying points of emphasis.

Following the *June Medical Services* decision, lower courts have disagreed regarding which test to use to evaluate laws regulating abortion. For example, the U.S. Court of Appeals for the Seventh Circuit followed *June Medical Services*' plurality opinion by applying the *Hellerstedt* balancing test. In contrast, the U.S. Court of Appeals for the Eighth Circuit determined that the reasoning in Chief Justice Roberts's concurrence set the precedent.[1]

STARE DECISIS

Stare decisis is a doctrine that generally directs the Court to follow its prior precedent. However, "[s]tare decisis is not an 'inexorable command'." [*Payne v. Tennessee*, 501 U.S. 808, 828 (1991).] In *Casey*, the Court articulated four factors it would consider when applying the doctrine: (1) whether a precedent has proven to be intolerable simply in defying practical workability; (2) whether the precedent is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; (3) whether related principles of law have so far developed as to have left the precedent no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the precedent of significant application or justification. Applying those factors in *Casey*, the Court concluded that: (1) determinations in *Roe* "fall within judicial competence"; (2) people have relied on the availability of abortion to organize their intimate relationships; (3) *Roe* is legally sound precedent; and (4) medical advances have not altered the core viability and medical risk thresholds in *Roe*. [Casey, 505 U.S. at 854-59.]

Recent U.S. Supreme Court opinions in other contexts shed light on some of the current justices' views on the proper analysis of *stare decisis* and offer some different factors from those articulated in *Casey*.[2] In a 2018 decision authored by Justice Alito, the Court opined that five *stare decisis* factors are most important: (1) the quality of the precedent's reasoning; (2) the workability of the rule it established; (3) its consistency with other related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision.[3] In a 2020 concurrence, Justice Kavanaugh offered a somewhat more stringent standard, opining that a proper *stare decisis* inquiry asks: "*First*, is the prior decision not just wrong, but grievously or egregiously wrong? ... *Second*, has the prior decision caused significant negative jurisprudential or real-world consequences? ... *Third*, would overruling the prior decision unduly upset reliance interests?"[4] In other cases, the Court has concluded that *stare decisis* "demands a special justification—over and above the belief that the precedent was wrongly decided."[5]

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

The Court heard oral argument in *Dobbs v. Jackson Women's Health Organization* on December 1, 2021. The case involves a challenge to a Mississippi law that generally prohibits abortions after 15 weeks gestation. The Court agreed to hear the case to consider whether all pre-viability limitations on elective abortions are unconstitutional. It will likely issue a decision in the case in spring of 2022.

Plaintiffs in the case argue that Mississippi's law violates the Court's abortion law precedents, which they argue the Court should reaffirm based on the *stare decisis* analysis in *Casey*. During the oral argument, plaintiffs noted the confusion that has emerged in applying the "undue burden" test but argued that viability is a workable and justifiable line to draw. They emphasized that a constitutional right to pre-viability abortions grounded in the Fourteenth Amendment – the central holding in *Roe* and *Casey* – has been widely relied upon and is unaffected by any major scientific or medical developments.

In contrast, Mississippi argues that *Roe* and *Casey* are "egregiously wrong" and should be overruled, or, at a minimum, that viability should be no longer be the applicable standard. During the oral argument, many of the justices appeared receptive to that argument, prompting media speculation that the Mississippi law will be upheld. It is uncertain whether the Court will overrule *Roe* and *Casey*, adopt a line other than viability, or resolve the dispute another way.

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[1] *Planned Parenthood of Indiana and Kentucky v. Box*, No. 17-2428 (7th Cir. 2021); *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020).

[2] For additional background on this topic, see Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 Harv. L. Rev. 308, 2020.

[3] *Janus v. American Federation of State, County, and Municipal Employees*, 585 U.S. ___ (2018).

[4] *Ramos v. Louisiana*, 590 U.S. ___ (2020) (Kavanaugh, J., concurring) (emphasis in original).

[5] See, e.g., *Kimble v. Marvel Entertainment, LLC*, 576 U.S. ___, (2015) (internal quotation marks omitted); *Janus v. American Federation of State, County, and Municipal Employees*, 585 U.S. ___ (2018).